

90-995

No.

Supreme Court
FILED

DEC 20 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

VIRGINIA C. WRIGHT,

Petitioner,

v.

ARLINGTON COUNTY DEPARTMENT
OF SOCIAL SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE SUPREME COURT OF
VIRGINIA ERRED BY HOLDING THAT
THE CORRECT STANDARD OF PROOF
IN CHILD ABUSE OR NEGLECT
PROCEEDINGS IS BY THE PREPONDERANCE
OF THE EVIDENCE.

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QUESTION PRESENTED FOR REVIEW

Whether The Supreme Court Of Virginia Erred By Holding That The Correct Standard Of Proof In Child Abuse Or Neglect Proceedings Is By The Preponderance Of The Evidence.

OPINION BELOW

Wright v. Arlington County Department of Social Services, ____ Va. App. ____, 388 S.E.2d 477 (Va. App. 1990), Appendix "A", was rendered February 6, 1990, by the Virginia Court of Appeals. A Rehearing En Banc was denied March 29, 1990. Appendix "B".

A Petition for Appeal to the Virginia Supreme Court was denied August 2, 1990. Appendix "C". A Rehearing to the Virginia Supreme Court was denied September 21, 1990. Appendix "D".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV. Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

Virginia Code section 16.1-279(A). If a child is found to be abused or neglected...the juvenile court or the circuit court, as the case may be, may make any of the following orders of disposition to protect the welfare of the child: (5) Terminate the rights of such parent...pursuant to section 16.1-283.

STATEMENT OF THE CASE

The Petitioner, Virginia C. Wright, appealed a decision of the Arlington County Juvenile and Domestic Relations District Court that awarded custody of her two children, Lisa and Lila Wright, to the Department of Social Services. The Arlington County Board of Social Services (DSS) appealed a decision in the same court proceeding that refused to terminate Appellant's residual parental rights.

A trial de novo was heard August 2, 3, and 4, 1988, in the Arlington County Circuit Court. Virginia Wright was granted a Plea in Equity, and in a bifurcated proceeding the jury found that the children were sexually abused by their mother. After further evidence, Virginia Wright's residual parental rights were terminated. The Final Order was entered September 29, 1988. Appellant, by counsel, objected to the Final Order.

Prior to the trial in the Arlington Circuit Court, Virginia Wright requested a ruling on the standard of proof to be used for the abuse or neglect question heard by the jury. Due Process pursuant to the Fourteenth Amendment was raised at his point. The Trial Court ruled that due process required only the preponderance of the evidence standard.

The Court of Appeals of Virginia issued an opinion affirming the judgment of the Arlington County Circuit Court on February 6, 1990. Virginia Wright's Petition for Rehearing En Banc to set aside that judgment was denied on March 29, 1990. The due process requirement was raised in the appeal to the Court of Appeals. The Court ruled that due process did not require proof in abuse and neglect proceedings greater than by a preponderance of the evidence.

On August 2, 1990, the Supreme Court of Virginia refused to grant a Petition for Appeal from the Court of Appeals' decision. A petition for Rehearing was denied by the Supreme Court of Virginia on September 21, 1990.

REASONS FOR GRANTING THE WRIT

THE SUPREME COURT OF VIRGINIA ERRED BY HOLDING THAT THE CORRECT STANDARD OF PROOF IN CHILD ABUSE OR NEGLECT PROCEEDINGS IS BY THE PREPONDERANCE OF THE EVIDENCE.

Under Virginia law, the State may terminate the residual rights of parents upon a finding that the child is "abused or neglected." Va. Code Section 16.1-279(A)(5). Section 16.1-279 lists additional options for orders of disposition when a child is found to be abused or neglected. Section 16.1-228 defines "abused or neglected child" but fails to indicate the standard of proof to be used when determining if a child is abused or neglected. However, pursuant to Section 16.1-283 the standard of proof for the termination of residual parental rights is to be "based upon clear and convincing evidence."

Using the clear and convincing evidence rule in abuse or neglect proceedings would be consistent with the express language in Section 16.1-283. A finding of abuse or neglect is the initial stage and can lead to the termination of residual parental rights. Additionally, abuse or neglect proceedings are more akin to criminal actions than civil proceedings and demand a higher standard of proof than mere preponderance of the evidence.

The United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982) ruled that the Due Process Clause of the Fourteenth Amendment requires that the State support its allegations by at least clear and convincing evidence in a proceeding to terminate residual parental rights. (Emphasis added). *Id.* at U.S. 748.

The Virginia Court of Appeals balanced the "three distinct factors" in *Santosky* as specified in *Mathews v. Eldridge*, 424 U.S. 319 (1976) to determine what burden of proof should apply when

the "issue is a temporary placement rather than permanent termination of parental rights." *Wright v. Arlington County Dept. Of Social Services*, ___ Va. App ___, 388 S.E.2d 477 (Va. App. 1990). The Court of Appeals distinguished *Santosky* by asserting that the issue in the instant case is temporary placement and the issue in *Santosky* was permanent termination of residual parental rights. However, *Santosky* was a bifurcated proceeding, and the permanent termination hearing was held only after the State proved by clear and convincing evidence that the child had been permanently neglected. In other words, a finding of permanent neglect did not automatically require termination.

The case at bar was also a bifurcated hearing to address similar questions. The jury determined if the children were abused or neglected before the Judge listened to testimony to decide the termination issue.

It was ruled in *Santosky* that the standard of proof in the permanent neglect determination in the first step of the bifurcated hearing must be clear and convincing evidence. *Santosky, supra* at U.S. 770. In fact, after first ruling that the preponderance of the evidence was not the appropriate standard of proof, the Court questioned whether the use of the clear and convincing standard of proof was appropriate or whether the beyond a reasonable doubt standard should be used. *Santosky, supra* at U.S. 766.

The Court of Appeals analyzed the *Eldridge* factors to determine the standard of proof in an abuse or neglect proceeding in Virginia. The factors are: 1. the private interests affected by the proceedings; 2. the risk of error created by the State's chosen procedure; and 3. the countervailing governmental interest supporting use of the challenged procedure. *Santosky, supra* at U.S. 755.

In the case at bar, the first factor requires that a higher standard than a preponderance of the evidence be used. As in *Santosky*, the factfinding hearing to decide if Virginia Wright sexually abused her daughters placed the State directly against the mother. The proceeding resembled a criminal trial. A charge of sexual abuse, especially against a mother, would naturally be

abhorrent to a jury. In the instant case, the jury was instructed to merely decide what evidence was more convincing.

In an abuse or neglect proceeding, the private interests of the parent and the child are particularly important and much more substantial than mere loss of money. The removal of a child may be temporary, but the consequences could be permanent. It could shatter family trust, stigmatize the child, and destroy the reputation of a parent. The proof required should be at least clear and convincing evidence.

Secondly, the risk of error created by the State's procedure of using a preponderance of the evidence standard is grave. In the case at bar, the jury had discretion to undervalue probative facts that may have helped Virginia Wright. The jury was instructed that their belief in just one witness could provide the greater weight of the evidence. (J.A. at 10).

Furthermore, the State had the resources to make its case and disprove Virginia Wright's case by obtaining experts in psychology to testify as well as their own caseworkers testimony. Since Mrs. Wright did not have equal access to such resources, the possibility of an erroneous decision is great.

A standard of proof that by its very terms demands consideration of the quantity, rather than quality, of the evidence may misdirect the factfinder in the marginal case. *In re Winship*, 397 U.S. 371, 90 S.Ct. 1097 (1970). A preponderance of the evidence standard does not indicate to the factfinder the importance of the decision.

Finally, the countervailing government interest also compels use of a higher standard. The government shares both a parens patriae interest in the welfare of the child and an interest in not making an erroneous accusation which would seriously weaken the existing family unit. The clear and convincing standard would strike a balance between using the beyond a reasonable doubt standard in favor of the parents and making it too easy to gain temporary custody by using the preponderance of the evidence standard.

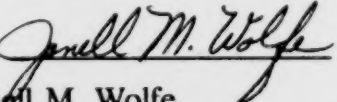
CONCLUSION

For the foregoing reasons Virginia Wright prays that this court will grant the Petition for Writ of Certiorari. The question involves a substantial constitutional challenge and a matter of significant precedential value.

The Court of Appeals of Virginia emphasized the temporary nature of removing a child pursuant to an abuse or neglect proceeding. In reality, even a temporary removal can be devastating to the family unit. The higher standard of proof is no threat to the child because the Department of Social Services either has the evidence or they do not. The lower standard allows the Department to do less than an adequate investigation before tampering with the integrity of the family. The placement may be temporary, but the consequences are permanent.

Respectfully Submitted,

VIRGINIA C. WRIGHT

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APPENDIX "A"

COURT OF APPEALS OF VIRGINIA

Present: Judges Coleman, Duff and Moon
Argued at Alexandria, Virginia

VIRGINIA C. WRIGHT

v. Record No. 1366-88-4

OPINION BY
JUDGE NORMAN K. MOON
February 6, 1990

ARLINGTON COUNTY DEPT. OF
SOCIAL SERVICES

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
Benjamin N.A. Kendrick, Judge

Janell M. Wolfe (Office of Janell M. Wolfe,
on brief), for appellant

Naomi C. Klause, Assistant County Attorney
(Charles G. Finn, County Attorney, on brief),
for appellee.

Virginia C. Wright appeals from a jury verdict finding that she had sexually abused her two daughters. The dispositive issue is whether in a proceeding to determine temporary custody the burden of proving child abuse is required to be by clear and convincing evidence or whether proof by a preponderance of the evidence is sufficient. We hold that the court properly instructed the jury that the burden of proof was by a preponderance of the evidence because the placement was a temporary one and not final until a second hearing is held to determine the permanent disposition.

Initially, three petitions were filed: one filed by the

Arlington County Board of Social Services alleging that the children were abused or neglected and seeking their custody; the second, also filed by the board, seeking termination of the mother's residual parental rights; a third, filed by the mother seeking to have the children's custody restored to her. The juvenile and domestic relations court heard the three petitions together and found that the children were neglected or abused. The court awarded custody to the Arlington County Board of Social Services and denied the mother's petition for custody and the board's petition to terminate parental rights. Both parties appealed to the circuit court. The mother appealed the temporary custody award to the Board of Social Services and the denial of her custody petition. The Board of Social Services appealed the denial of its petition to terminate parental rights.

The circuit court granted Virginia Wright's motion for a jury trial on an issue out of chancery limited to whether she had abused or neglected her daughters. Whether the children were to be placed in foster care if they had been abused was for the judge to determine. On an instruction advising the jury that the burden of proof was by a preponderance of the evidence, the jury found that Virginia Wright had sexually abused her daughters.

In the case of a child placed in foster care as a result of abuse or neglect proceedings, the placement is temporary. Code Section 16.1-282. A second petition for a permanent custody determination must be filed and the statute requires that this be done within sixteen months. *Id.* For permanent termination of all parental rights, the Supreme Court of Virginia has held that the burden of proof is by clear and convincing evidence. See *Bailes v. Sours*, 231 Va. 96, 100, 340 S. E. 2d 824, 827 (1986). The United States Supreme Court also has ruled on the constitutional issues in cases of this nature. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court held that before parental rights may be terminated, the Fourteenth Amendment's Due Process Clause demands that the state support its allegations at least by clear and convincing evidence. The Court's rationale in *Santosky* turned on balancing "three distinct factors" which were specified in *Mathews v. Eldridge*,

424 U.S. 319 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedures; and the countervailing governmental interest supporting use of the challenged procedure. *Santosky*, 455 U.S. at 755.

We balance and apply these same three *Eldridge* factors in our determination of what burden of proof should apply when the issue is a temporary foster care placement rather than permanent termination of residual parental rights. First, the interest of the parent is substantial, although obviously not as substantial as it would be in a permanent termination. Unlike *Santosky*, the Commonwealth in the present proceedings seeks a temporary foster care placement and not to end the parental relationship. Likewise, unlike *Santosky*, these proceedings are not final and irrevocable. We conclude that the first *Eldridge* factor does not compel use of the higher burden of proof.

We next consider the risk of error created by the State's chosen procedures. The risk of error is greater from the parent's point of view if the preponderance of the evidence standard is used. Like *Santosky*, the issues in these proceedings are largely subjective and involve application of imprecise standards. Additionally, the Commonwealth's ability to assemble its case almost inevitably dwarfs the parent's ability to mount a defense. However, unlike *Santosky*, further proceedings involving these issues are contemplated and the risk of error going undetected is minimized. Also, the board of social services is required to make diligent efforts to return the child to the parents as soon as possible and its progress toward that goal must be periodically reviewed by the court. See Code Sections 16.1-281-82. An error in the fact finding process is likely to become apparent during the review proceedings and corrected by the trial court. Code Section 16.1-282 requires that a petition for disposition be filed within sixteen months of the child's initial foster care placement. No permanent custody determination is made unless another petition is filed alleging abuse and neglect and the higher standard of proof for the permanent determination applies. Thus, with regard

to the second *Eldridge* factor, we conclude that circumstances do not weigh heavily in favor of the higher standard of proof.

Finally, we consider the last *Eldridge* factor -- the countervailing governmental interest in support of the use of the challenged procedure. The Commonwealth has a parens patriae interest in promoting the welfare of the child. The Commonwealth also has a fiscal and administrative interest in reducing the cost and burden of the proceedings. The Commonwealth's interest in these proceedings is to secure a safe environment for the child pending efforts to rehabilitate the family structure. After a temporary foster care placement, the Commonwealth is required to take steps to re-unite the family. Finally, the Commonwealth is required to institute additional proceedings if it wishes to terminate parental rights. We conclude that the third *Eldridge* factor does not compel use of the higher standard of proof.

We conclude that the first and second *Eldridge* factors are satisfied by employing the preponderance of the evidence standard, and that the third factor is served by employing that standard. We thus hold that the preponderance of the evidence standard is an appropriate standard for an abuse and neglect proceeding which may lead to temporary placement of the child. The due process clause does not require use of a clear and convincing standard, necessary for termination of residual parental rights proceeding.

Other courts have concluded that a preponderance of the evidence standard in abuse and neglect proceedings is constitutionally sufficient. *In re Sabrina*, 460 A.2d 1009 (Me. Sup. Ct. 1983); *In re O.E.P.*, 654 P.2d 312 (Colo. Sup. Ct. 1982); *In re Linda C.*, 86 A.D. 2d 356, 451 N.Y. So. 2d 268 (1982). We agree with the Maine Supreme Court in *Sabrina* where it is stated:

Although a stricter standard creates a smaller risk that parental rights will be erroneously curtailed in a child protection proceeding, it also creates a greater risk that the child will be forced to remain in or return to a jeopardous environment. Here, especially

because the parental rights will at most be temporarily curtailed, we think that the State's interest in protecting a child from the risk of serious and potentially irrevocable harm counterbalances the parents' interest in avoiding an erroneous curtailment of their rights. Accordingly, we conclude that use of proof by a preponderance of the evidence standard reflects that the risk of error should be borne in roughly equal fashion and satisfies due process in a child protection proceeding.

In re Sabrina M., 460 A.2d at 1017.

The welfare of the child is the paramount issue in cases such as this. Because the placement is only temporary and the risk of an improper placement can be corrected by subsequent action, we do not believe that due process requires proof in abuse or neglect proceedings greater than by a preponderance of the evidence.

Ms. Wright also contends that the evidence was insufficient to support a finding that she sexually abused her children. We need not recite the evidence here except to say that the children graphically detailed acts of sodomy between Ms. Wright and them and between her boyfriend and them in her presence. In short, we reject the claim that the evidence was insufficient.

Accordingly, the judgment appealed from is affirmed and the cause remanded to the trial court for such further proceedings as are consistent with this opinion.

Affirmed.

APPENDIX "B"

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 29th day of March, 1990.

Virginia C. Wright,

Appellant,

against Record No. 1366-88-4
 Circuit Court No. CH88-258

Arlington County Department of
Social Services,

Appellee.

Upon a Petition for Rehearing En Banc
Before the Full Court

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 6th day of February, 1990 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that is appropriate to grant the petition for rehearing en banc in this case. Code Section 17-116.02(D).

A Copy,

Teste:

Patricia G. Davis, Clerk

By:

Deputy Clerk

APPENDIX "C"

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of August, 1990.

Virginia C. Wright,

Appellant,

against Record No. 900505
 Court of Appeals No. 1366-88-4

Arlington County Department
of Social Services,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

APPENDIX "D"

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 21st day of September, 1990.

Virginia C. Wright,

Appellant,

against Record No. 900505
 Court of Appeals No. 1366-88-4

Arlington County Department
of Social Services,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of August, 1990 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Test:

Clerk

